

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

PRIMEFLIGHT AVIATION SERVICES, INC.)	
)	
)	
Respondent,)	
)	NLRB CASE NOS.: 29-CA-177992
and)	29-CA-179767
)	29-CA-184505
SERVICES EMPLOYEES)	
INTERNATIONAL UNION, LOCAL 32BJ)	
)	
)	
Charging Party)	
_____)	

**POST-HEARING BRIEF OF PRIMEFLIGHT AVIATION
SERVICES, INC.**

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I. PRELIMINARY STATEMENT

General Counsel has alleged that Respondent, PrimeFlight Aviation Services, Inc., (“PrimeFlight”), violated Section 8(a)(1) and 8(a)(5) of the National Labor Relations Act (“NLRA” or the “Act”) by: (1) refusing to recognize Service Employees International Union Local 32BJ (“SEIU 32BJ” or the “Union”) as the bargaining representative for PrimeFlight's employees at John F. Kennedy International Airport (“JFK”), where PrimeFlight provides certain airline support services to JetBlue Airways Corporation (“JetBlue”); and, (2) refusing to provide information to SEIU 32BJ relevant to the union's role as the bargaining agent for PrimeFlight employees. Additionally, General Counsel alleges that PrimeFlight violated Section 8(a)(1) of the Act by: (1) maintaining a mandatory arbitration agreement that waives employees right to pursue class or collective actions; and, (2) threatening employees with discharge because they supported the Union.

General Counsel’s entire case is fatally flawed at the outset because, as the evidence and testimony in the record show, PrimeFlight is not an “employer” under the NLRA. Rather, PrimeFlight is subject to the Railway Labor Act (“RLA”) and as such expressly excluded from the coverage of the NLRA. PrimeFlight's employees perform jobs traditionally performed by RLA carriers, and PrimeFlight is under the direct and indirect control of an RLA carrier. Under longstanding RLA principles, PrimeFlight is, therefore, a derivative carrier under Section 151 of the RLA.

Even assuming for the sake of argument that PrimeFlight is subject to the NLRA, the General Counsel has failed to satisfy its burden that PrimeFlight is a successor employer of employees represented by SEIU 32BJ. PrimeFlight demonstrated at the hearing that it did not attain its full complement of employees until several weeks after SEIU 32BJ demanded

recognition as the bargaining agent, by which time the predecessor employees formerly represented by SEIU 32BJ constituted only a minority of PrimeFlight's employees. Therefore, even assuming arguendo PrimeFlight is an employer subject to the NLRA, it is nonetheless not a successor employer and, therefore, not obligated to recognize or bargain with the Union or to provide the Union information.

Next, PrimeFlight's arbitration agreement limiting the filing of class action, collective action, and representative action claims does not violate the Act as alleged. To the contrary, U.S. Courts of Appeals have almost universally found such waiver provisions to be lawful under the Federal Arbitration Act. Accordingly, the allegation is without merit.

Finally, the only witness the General Counsel produced to testify about the alleged threat is simply not credible. He lied under oath about the real reason he was separated from employment at a prior employer (i.e. a physical altercation with his supervisor). The witness also testified that he had been "locked up" for the incident and that when he applied for work with PrimeFlight he neglected to "tell the full story."

In sum, PrimeFlight respectfully submits that the credible, probative evidence advanced at trial does not support the General Counsel's allegations, and dismissal of the Amended Complaint in its entirety is required.

II. PROCEDURAL HISTORY

SEIU 32BJ filed three separate unfair labor practice charges with Region 29 of the National Labor Relations Board, beginning with Case No. 29-CA-177992 on June 10, 2016.¹ Cases 29-CA-179767 and 29-CA-184505 were filed on July 11, 2016 and September 15, 2016 respectively.

The Regional Director issued an Order Further Consolidating Cases, an Amended Consolidated Complaint and Notice of Hearing (“Amended Complaint”) on October 3, 2016 alleging violations of the Act as set forth above. On October 17, 2016, Respondent filed its Answer to the Amended Complaint.

The Hearing was held before Administrative Law Judge Mindy E. Landow on October 18, 19 and 20, 2016 in Brooklyn, New York.

III. STATEMENT OF FACTS

A. Background of Operations

In March 2016, PrimeFlight was awarded the contract to provide airline support services to JetBlue at JFK. PrimeFlight commenced providing those services on May 9, 2016. (Tr. at 216). The services PrimeFlight provides at JFK include wheelchair handling for disabled customers, skycap curbside check-in, baggage handling, and security line queue monitoring. (Tr. at 218). PrimeFlight provides these services under the terms of a General Terms Agreement ("GTA") executed by PrimeFlight and JetBlue, as well as a Statement of Work ("SOW") appended to the GTA. (Tr. at 223-225; Jt. Ex. 2).

B. PrimeFlight Begins Operations at JFK Providing Services to JetBlue Previously Provided by Air Serv and Pax Assist at JFK

PrimeFlight provides services at JFK that were previously provided to JetBlue by Air Serv Corporation and PAX Assist. Prior to PrimeFlight, Pax Assist provided the wheelchair services and Air Serv provided the other services, including sky cap, baggage handling, and line queue services. (Tr. at 218).

¹ References to the hearing transcript appear as "Tr. .". References to the General Counsel's, and Respondent Employer's Exhibits appear respectively as "GC Ex. ____", and "Er. Ex. ____". Joint exhibits appear as "Jt. Ex. ____".

Matthew Barry, PrimeFlight Division Vice President, testified that upon being awarded the contract in March 2016 and in anticipation of the impending May 9 commencement of operations at the airport, PrimeFlight recruited, trained and hired approximately 364 employees. (Er. Ex. 4). Of the 364 employees initially hired, 189 were former AirServ employees. (Tr. at 229; Jt. Ex. 1).

Barry further testified that immediately after commencing the work, PrimeFlight understood that the staffing was insufficient “to manage the volume of requests that [PrimeFlight] would be receiving, in particular on the wheelchair operation” (Tr. at 230). The staffing problem was compounded by the fact that JetBlue had not clearly communicated work that PrimeFlight would be responsible for handling, including employees who would work “hand-in-hand with the TSA for moving baggage that is being scanned.” (Tr. at 231). Barry testified that as a result of the staffing problems, PrimeFlight “conservatively estimated” a need to hire an additional 250 people, and targeted about 500 employees total at JFK to be hired in two phases, the first in early June and the second in late June/ early July. (Tr. at 233, 236).

In fact, on May 13, 2016, a mere four days after PrimeFlight commenced operations at JFK, JetBlue Manager Christopher Kemmerer emailed PrimeFlight managers, including Matt Barry, acknowledging PrimeFlight’s staffing shortage:

... This evening.. we had 6 JetBlue Customer Service supervisors plus a duty manager pushing wheelchairs through our Customs hall.

For leadership’s awareness, we would like to see a shift breakdown of staffing by each position at the beginning of the AM and PM shift starting tomorrow through the weekend.

We are prepared to supplement your staffing at certain positions so that you can throw that manpower into the wheelchair operation.

Er. Ex. 1(emphasis added).

Barry testified that the staffing problems continued “until [PrimeFlight] had the ability to hire additional folks.” (Tr. at 238). Also in accordance with JetBlue’s requirement for a “shift breakdown of staffing by each position,” Barry testified that PrimeFlight provides an Excel document “on a daily basis to JetBlue and their leadership team that outlines and delineates, at a particular time of day, how many employees [PrimeFlight] actually, physically [has] on staff to perform the variety of functions that [PrimeFlight] is contracted for.” (Tr. at 239).

On May 18, 2016, Barry emailed PrimeFlight managers at JFK that, among other things, they needed to focus on “**recruiting/training heavily.**” (Er. Ex. 2). Barry testified that he sent the email because of PrimeFlight’s “concerns about not having enough staff to support the operation” mainly concerning the wheelchair positions. (Tr. at 241).

By June 16, 2016, PrimeFlight hired approximately 78 additional employees, only 8 of whom were former Air Serv employees. That means that by June 16, only 197 of the 440 employees at JFK were former Air Serv employees. (Tr. at 271; Jt. Ex. 1; Er. Ex. 4).²

C. SEIU 32BJ Demands Recognition for PrimeFlight’s Wall-to-Wall Unit, Including Wheelchair Services Not Previously Represented

On May 23, 2016, well after PrimeFlight had made and begun implementing its decision to ramp up its workforce, Brent Garren, counsel for SEIU 32 BJ sent a letter to PrimeFlight demanding recognition by PrimeFlight as the labor representative for the former “Air Serv employees represented by Local 32BJ.” Garren also demanded recognition for

² Jt. Ex. 1 is a list of all Air Serv employees hired by June 16, 2016. Checking the former Air Serv employees’ listed in that exhibit with their hire dates listed in Er. Ex. 3 shows the following: (1) by May 7, 2016, PrimeFlight had hired approximately 362 total employees, 189 of whom were hired from Air Serv; (2) by June 16, 2016 PrimeFlight hired approximately 78 additional employees, only 8 of whom were former Air Serv employees.

PrimeFlight's wheelchair services employees, who were not previously included the Union's purported bargaining unit:

As we understand it, the appropriate bargaining unit also includes employees providing wheelchair assistance. We request recognition for a unit of all full-time and regular part-time employees at Terminal 5 on the Jet Blue account, excluding supervisors, office clericals, and guards as defined in the NLRA.

(Jt. Ex. 3)

PrimeFlight Senior Vice President William Stejskal, responded by letter dated May 25, 2016 requesting that the Union provide evidence establishing the basis of its demand for recognition and bargaining. (Jt. Ex. 3). Stejskal also requested that the Union provide the NLRB certification and any applicable collective bargaining agreements. (Jt. Ex. 3). On June 2, the Union sent PrimeFlight a copy of a purported recognition agreement between the predecessor employer Air Serv and SEIU 32BJ. (Jt. Ex. 3). Stejskal responded in a June 10 letter acknowledging receipt and reiterating the request for any collective bargaining agreement. (Jt. Ex. 3). Garren sent the final correspondence on June 15 refusing to provide any further information and claiming that because the recognition agreement with Air Serv was entered into over six months prior it could not be legally challenged. (Jt. Ex. 3).³

D. PrimeFlight Provides Essential Airline Services to JetBlue

Since commencing operations at JFK on May 9, 2016, and continuing to today, PrimeFlight has provided various services directly for its client JetBlue at JFK. (Tr. at 216)

³ It is noted that the ALJ quashed the vast majority of PrimeFlight's subpoena *duces tecum* to SEIU 32BJ and would not allow PrimeFlight to question witnesses regarding the nature of the Union's relationship with Air Serv, the predecessor employer at JFK. In so ruling, the ALJ incorrectly stated that "the nature of Local 32BJ's recognition is precluded by Section 10(b) of the Act." The six-month statute of limitations provided for in Section 10(b) pertains to the timing of conduct that is the subject of an unfair labor practice charge. Section 10(b) does not, however, limit the relevance of facts and evidence, which occur more than 6 months prior to the charge, if those facts provide context to unfair labor practice allegations.

1. Wheelchair Services: PrimeFlight provides Wheelchair Services for JetBlue passengers requiring wheelchair transport in moving through the terminal. (Tr. at 218; Jt. Ex. 2 at 24.). These services include, but are not limited to servicing:

- “walk-up” customers requiring assistance by wheelchair;
- “planned” and “unplanned” customers requiring wheelchair assistance throughout the airport, including transport between gates;
-
- Customers who are waiting to board a flight or waiting for transportation; and,
- customers who need wheelchair to assistance making restroom and concession visits

Tr. at 218-219; Jt. Ex. 2 at 25, 26.

2. Baggage Handling Services: PrimeFlight provides two types of baggage services, including curbside baggage check-in, also known as "Skycap" service, and traditional baggage handling inside the terminal where JetBlue operates. (Tr. at 217-218, 222; Jt. Ex. 2 at 23-26.) These services include, but are not limited to providing assistance with:

- baggage transfer services for JetBlue customers;
- baggage movement by preparing and identifying bags needing transfer in the airport;
- placing customer luggage onto baggage belts and into baggage system from behind the check-in counter; and,
- picking up and dropping off baggage to be taken to appropriate areas.

Tr. at 220-222; Jt. Ex. 2 at 26

3. Line Queue Monitoring:

PrimeFlight also provides employees for Line Queue Monitoring, providing line monitors for the passenger lines at security checkpoints run by the Transportation Safety Administration (Tr. at 220). These services include, but are not limited to, maintaining:

- the integrity of the queue system at each checkpoint;
- communication with the TSA on any JetBlue passenger issues: and,
- compliance with FAA carry-on compliance.

Jt. Ex. 2 at 26.

E. PrimeFlight Operates Its Business at JFK Under the Close Control of JetBlue

JetBlue exercises substantial control over nearly every aspect of PrimeFlight's JFK operations. As a threshold matter, the job duties of the PrimeFlight employees working at JFK are determined entirely by PrimeFlight's agreement with JetBlue to provide the functions described in Section D, above. Beyond the tasks they perform, PrimeFlight employees' environment, supervision, hours, workload, training, clothing, and work records are under the direct control of JetBlue.

Physical Space: PrimeFlight's employees work entirely in physical space controlled by JetBlue, performing their duties in JFK's Terminal 5 to support JetBlue's airline operations. (Jt. Ex. 2 at 23). PrimeFlight has no physical space of its own at JFK and relies entirely on JetBlue for office space. (Tr. at 248-250). JetBlue also provides and controls the locker room where PrimeFlight employees store their personal belongings while at work, as well as the break room where PrimeFlight employees take their breaks. (Tr. at 249).

Training: PrimeFlight employees are trained on JetBlue training modules regarding JetBlue policies and procedures. (Tr. at 262). The GTA specifies that PrimeFlight “will send

employees to JetBlue University (“JBU”) for “Train the Trainer” training...” (Jt. Ex. 2 at 8.1). PrimeFlight’s trainers must then ensure that every PrimeFlight employee receives “the required JetBlue provided curriculum initial training... prior to the employee performing any function on the behalf of JetBlue...” (Jt. Ex.2 at 8.6). PrimeFlight skycap employees must also be trained in JetBlue’s backup processes should a check in system malfunction occur. (Jt. Ex. 2).

Equipment: JetBlue provides PrimeFlight’s employees with equipment used at JFK, including traditional and aisle wheelchairs, baggage carts, tablets, radios, computers, and telephones. (Tr. at 252). JetBlue also provides PrimeFlight employees with internet service, as well as software or technology platforms necessary to perform job responsibilities. (Tr. at 252).

PrimeFlight skycap employees are required to login to JetBlue’s computer system (“Sabre”) using a unique individual login in order to check-in customers, check seat availability, issue seat assignments, and boarding passes, process any baggage fees collected, tag customer bags, issue receipts; etc. (Tr. at 257; Jt. Ex. 2).

Record-Keeping and Auditing: JetBlue has the right to inspect and audit PrimeFlight's "books, records, and manuals ... at all times." (Jt. Ex. 2 at 13.1, 13.2.) PrimeFlight is required by contract to provide JetBlue with copies of training records, workplace accidents and injuries, employee grievances, and employee disciplinary actions upon JetBlue's request. (Jt. Ex. 2 at 7.3) JetBlue has the right to access records that it requires PrimeFlight to maintain, including, but not limited to: electronic tracking of all JetBlue wheelchairs; tracking of customer wait times and complaints; number of hours worked by PrimeFlight employees; certifications of PrimeFlight employees quarterly training, etc. (Jt. Ex. 2 at 25, 28).

Additionally, JetBlue requires that PrimeFlight provide JetBlue a daily shift report as well as daily, weekly and monthly accounting of all data pertaining to wheelchair services. (Jt. Ex. 2 at 25; Er. Ex. 6). Further, JetBlue requires that PrimeFlight track all customer wait times and complaints. (Jt. Ex. 2 at 25).

Discipline/ Termination: Although JetBlue has not yet exercised this authority, which is not surprising given the short period of time (about 5 months at the time of the hearing) that PrimeFlight has provided services at JFK, Barry testified on direct examination that JetBlue does have the authority to remove PrimeFlight employees from the airport contract:

Q. With respect to JFK and JetBlue. If they ask you to remove an employee, what would your response be?

A. My understanding is, per our general terms agreement, contract with them, if they were to request it then I would have to abide.

Tr. at 265.

Then, later on cross examination, Barry testified consistently as follows:

Q. You testified that JetBlue has never required PrimeFlight to terminate any employee at JFK, isn't that right?

A. Yes.

Q. However, I believe you testified that if that were to happen PrimeFlight would be required to terminate the employee under the agreement with JetBlue, isn't that right?

A. We would be required to remove them from their contract.

Q. Which provision in the agreement requires PrimeFlight to remove JFK employees at JetBlue's request?

A. 7.6

Section 7.6 of the GTA provides, in relevant part, as follows:

If, at any time, any of the workers performing the Services shall be unable to work in harmony or shall interfere with any labor employed by JetBlue or any tenant of the area in which the services are performed, Business Partner shall take such reasonable steps as shall be necessary to resolve such dispute including but not limited to the removal and replacement of employees.

Work Schedules and Staffing Levels: JetBlue advises PrimeFlight of the number of flights JetBlue will have each day, how many wheelchair passengers JetBlue expects, and what times during the day PrimeFlight's employee positions need to be covered, including the ticket counter, security checkpoint, and baggage handling. (Tr. 243-245). JetBlue has an expectation for the minimum number of workers for each position, which leads directly to how many people PrimeFlight schedules and how many hours are scheduled. (Tr. at 244). JetBlue directs PrimeFlight employees with respect to assisting JetBlue customers who need wheelchair assistance. (Jt. Ex. 2 at 24). Section 9.1 of the GTA expressly requires that PrimeFlight maintain staffing to JetBlue's satisfaction:

The parties acknowledge that JetBlue's flight activity may increase or decrease over the duration of the Term, and that it will be the responsibility of PrimeFlight to maintain appropriate levels of personnel and equipment to perform the Services in strict accordance with this Agreement, regardless of any such activity.

Jt. Ex. 2 at 9

Workplace Supervision: JetBlue has the authority to require the removal of PrimeFlight employees from the workplace for disciplinary or performance reasons. (Tr. at 264). This authority is set forth in Section 7.6 of the GTA. (Tr. at 287; Jt. Ex. 2 at 6).

JetBlue's SOW with PrimeFlight imposes rules of conduct which PrimeFlight employees must observe in executing their duties at JetBlue's operation. For example, Skycaps

must be "professionally dressed and neatly groomed." (Jt. Ex. 2 at 24.) The SOW further imposes restrictions on how Skycaps handle financial transactions and issue documentation to passengers. (Jt. Ex. 2 at 24.)

Wheelchair Assistants and baggage handlers are also required to dress and groom themselves appropriately under the SOW. (Jt. Ex. 2 at 25, 26.) Wheelchair Assistants are precluded from using their cell phones while working and from sleeping on duty. (Jt. Ex. 2 at 25.) The GTA further provides, "[PrimeFlight] shall enforce strict discipline and good order among its employees, to maintain and observe sound and harmonious business practices, and to take all reasonable steps to avoid labor disputes" (Jt. Ex. 2 at 7.6.)

Uniforms: Prior to commencing work on the contract at JFK, PrimeFlight first had to receive approval from JetBlue's branding department regarding the uniforms PrimeFlight employees were to wear. JetBlue has ongoing control over this — if PrimeFlight changes its uniforms, PrimeFlight must get approval from JetBlue. (Tr. at 253-256).

F. PrimeFlight Maintains a Mandatory Arbitration Agreement

PrimeFlight's employees nationwide who were hired on or after January 1, 2012 are required to accept the terms of PrimeFlight's arbitration agreement. (Tr. at 309, 311). By entering into the Agreement, an employee agrees to resolve certain disputes "arising out of or related to [the employee's] employment with the Company..." with PrimeFlight through binding arbitration. (GC Ex. 7). The Agreement explicitly provides:

Because this Agreement is intended to resolve the particular dispute as quickly as possible, the Arbitrator shall not have the authority to consolidate the claims of other employees into a single proceeding, to fashion a proceeding as a class, collective action, or representative action, or to award relief to a class or group of employees

GC Ex. 7

The Agreement expressly affirms it does not comprise a waiver of the employee's right to file claims with the NLRB:

This Agreement does not affect or limit Employee's right to file an administrative charge with a state or federal agency such as the National Labor Relations Board or Equal Employment Opportunity Commission...

GC Ex. 7

No PrimeFlight employee has been disciplined or terminated for filing a collective or class action. (Tr. at 369).

IV. LEGAL ARGUMENT

A. PrimeFlight Is Outside the Jurisdiction of the National Labor Relations Board for Unfair Labor Practice Proceedings Because PrimeFlight Is a "Derivative Carrier" Under the Railway Labor Act.

The Railway Labor Act, 45 U.S.C. §§ 151 et seq., governs labor relations between common carriers, such as airlines and railroads, and their workers, as well as the labor relations of carrier-associated companies which provide services to common carriers that are typically and traditionally provided by the carriers themselves. See 45 U.S.C. § 151(1). These carrier-affiliated companies, known as "derivative carriers," are subject to the RLA so long as the derivative carrier meets a two-step test outlined by the federal courts and discussed further below. The RLA, enacted in 1926, created a "special scheme to govern the labor relations of railroads and airlines because of their unique role in serving the traveling and shipping public in interstate commerce." *Verrett v. SABRE Grp., Inc.*, 70 F. Supp. 2d 1277, 1281 (N.D. Okla. 1999)⁴

The grouping of derivative carriers within the same labor relations scheme as common carriers serves the important federal policy of consistent treatment of like employers for the

⁴ While the RLA originally applied to the railroads, its ambit was extended to the airline industry in 1936. See 45 U.S.C. §§ 181, 182. As such, derivative carriers affiliated with airlines are covered by the RLA.

purpose of avoiding interruptions in the service of carriers critical to national and international commerce. 45 U.S.C. § 151a. *See Verrett*, 70 F. Supp. 2d at 1281 ("When the activities of carrier affiliates are necessary to the operations of an air carrier, and a labor dispute at the affiliate could cripple airline operations, those affiliates must be subject to the RLA because such disruption is the very type of interruption to air commerce the RLA was designed to prevent.").

Critically for purposes of this action, employers subject to the RLA are excluded from jurisdiction under the NLRA and, by extension, the National Labor Relations Board. A derivative carrier may not be subject to both the NLRA and the RLA. Coverage of an employer by the RLA, by definition, excludes that employer from the jurisdiction of the NLRB. See 29 U.S.C. § 152(2) ("The term "employer" ... shall not include [j] any person subject to the Railway Labor Act"). Because PrimeFlight is a derivative carrier to JetBlue under RLA Section 151, the NLRB has no jurisdiction to conduct unfair labor practice proceedings against PrimeFlight as a respondent.

B. RLA Coverage of Derivative Carriers Is Analyzed Under a Two-Part Test.

The text of the RLA puts forth a two-part test for derivative carrier status, focusing on the functions employees perform and whether the company is controlled by air or rail carriers:

The term "carrier" includes ... any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad

45 U.S.C. § 151.5⁵ In other words, as interpreted by the National Mediation Board and the federal courts, the functions performed by the potential derivative carrier's employees must be

⁵ Section 181 of the RLA extends this test to companies controlled by and performing services for airline carriers such as JetBlue. See 45 U.S.C. § 181. See also *Westbrook v. Sky Chefs, Inc.*, 35 F.3d 316, 317 (7th Cir. 1994).

among those traditionally performed by carrier employees, and the potential derivative carrier's labor relations must be subject to significant control by the carrier. See *Cunningham v. Electronic Data Systems, Inc.*, 579 F. Supp. 2d 538, 541 (S.D.N.Y. 2008); *Verrett*, 70 F. Supp. 2d at 1281. Both criteria must be met for the test to be satisfied.

Thus, the NMB's interpretations of those job duties which qualify as traditional carrier functions are entitled to deference, as is the NMB's analysis of carrier control over derivative carriers. See *Cunningham*, 579 F. Supp. 2d at 542. See also *Delpro Co. v. Brotherhood Railway Carmen*, 676 F.2d 960, 962-63 (3d Cir. 1982) ("the construction of the statute by the administering body charged with administering it is generally entitled to deference"); *Brotherhood of Locomotive Firemen and Enginemen v. National Mediation Board*, 410 F. 2d 1025, 1033-34 (D.C. Cir. 1969) (NMB determinations of jurisdiction relating to employee work classifications entitled to deference).⁶

Perhaps even more compelling is the fact that after analyzing PrimeFlight's nearly identical operations at LaGuardia Airport, just a few just a few miles away from JFK, it determined that PrimeFlight was indeed a derivative carrier subject to the RLA, not the NLRA. See *PrimeFlight Aviation Services, Inc.* 34 NMB 175 (2007). In that case, similar to the control criteria at JFK established below, the NMB found that it retained jurisdiction where:

- Carriers require PrimeFlight to maintain records of employees who have successfully completed the Carrier-mandated training"
- Carriers have access to PrimeFlight's employee training records.
- Carrier representatives train and designate PrimeFlight employees as Carrier trainers who, in turn, train other PrimeFlight employees.

⁶ It is noted that since about 2010 there has been a dramatic shift, without explanation, away from the Board's longstanding practice of referring cases of arguable RLA jurisdiction to the NMB to determine whether or not an employer is subject to the RLA, the law the NMB enforces. This policy is just common sense. Surely, the NLRB would not cede to other agencies the right, in the first instance, to determine whether an entity is an employer pursuant to Section 2(2) of the NLRA. Further this shift in policy has bypassed both Congress and the Administrative Procedure Act.

- Carriers' schedules dictate the staffing levels and shift assignments of PrimeFlight employees
- Carrier officials make changes in daily assignments regularly.
- Although PrimeFlight hires its own employees and sets their wages and benefits, the Carriers report problems with PrimeFlight's employees.
- PrimeFlight has complied with the Carrier's request to reassign a PrimeFlight employee.
- PrimeFlight's baggage service agents and priority parcel service employees wear Carrier uniforms.
- The rest of PrimeFlight's employees wear PrimeFlight uniforms approved by the Carriers.

Id. at pp. 182-183

1. **PrimeFlight's JFK Operations Satisfy the "Function" Aspect of the "Derivative Carrier" Test Under the RLA.**

The "function" prong focuses on whether the work performed is that which traditionally has been performed by carrier employees, and the NMB has set forth numerous opinions stating the types of work which qualify as services traditionally performed by airline carriers. As discussed above, PrimeFlight's services to JetBlue at JFK include the following classifications of work: baggage handling, skycap, line and queue monitoring, and wheelchair assistance. Examination of NMB precedents demonstrates that all of PrimeFlight's JFK employees fall well within the scope of job responsibilities recognized as traditional airline craft and class functions.

Baggage Handling: One of the crafts or classes of airline employees recognized by the NMB is "fleet service" workers, which consists primarily of baggage handlers those who load and unload baggage, deliver and pick up baggage from baggage areas, sort baggage, operate ramp equipment and motorized ground equipment, and complete paperwork associated with the movement of baggage. See *Northwest Airlines, Inc.*, 18 NMB 357, 359-60 (1991). PrimeFlight's baggage handling employees at JFK fall precisely the types of duties described by the NMB: handling passenger baggage at the ticket counter and baggage claim, and delivering baggage to

baggage conveyor belts in the oversized baggage and international customs areas. *See also Boeing Airport Equip.*, 7 NMB 396 (1980) (company that had contract to install and maintain a BETS for the airline covered by the RLA; its "baggage handling activities were furnished in support of United's air carrier activities and constitute a portion of the regular business of United at their other stations").

Skycap and Wheelchair Assistance: PrimeFlight's evidence also shows that its employees perform "skycap" services (such as curbside luggage handling) and wheelchair services. Indeed, wheelchair assistance to passengers comprises nearly half of PrimeFlight's employee complement at JetBlue. The NMB has stated:

Skycap and wheelchair attendant duties, including baggage handling, are functions traditionally performed by employees in the airline industry. Quality Aircraft. Services, (QAS) 24 NMB 286 (1997); Service Master Aviation Services, 24 NMB 181 (1997); International Total Services, 20 NMB 537 (1993); Sky Valet, 18 NMB 482 (1991); Skycap, Inc., 13 NMB 292 (1986). Therefore, the first prong of the [National Mediation] Board's jurisdictional test is satisfied.

VGR International Business, Inc., 27 NMB 232 (2000).

Passenger Line Monitoring: PrimeFlight's evidence establishes that it employs workers whose function is to monitor passenger lines as they move through security checkpoints and to assist passengers in navigating the customs areas. *See, International Assn. of Machinists and Aerospace Workers*, 27 NMB 307 (2000) (Quality Service Agents who assisted with crowd control and directing lines were properly within NMB certification for Passenger Service Employees craft or class under RLA); *Laker Airways, Ltd.*, 8 NMB 158 (1980) (employees with duties including escorting passengers through customs and assisting disabled passengers are part of the passenger service employees craft or class).

2. **PrimeFlight's JFK Operations Satisfy the "Control" Aspect of the "Derivative Carrier" Test Under the RLA.**

Where, as here, the airline carrier involved does not own and is not commonly owned with the derivative carrier, the second factor in the function and control test turns on whether the airline carrier controls, directly or indirectly, the employer and its employees. In particular, the control factor focuses on the role that the carriers play in the company's daily operations and on the manner in which the employees perform their jobs. See, e.g., *Quality Aircraft Servs.*, 24 NMB 286, 291 (1997). The factors that are considered include:

- Control over the manner in which the entity conducts its business, including access to the employer's operations and records;
- Involvement in hiring, firing and disciplinary decisions;
- Supervision and direction of the entity's employees in the performance of their job duties;
- Influence over the conditions of employment;
- Influence over employee training; and
- Control over uniform and appearance requirements.

See, e.g., *Automobile Distr. of Buffalo Inc. and Complete Auto Network*, 37 NMB 372, 378 (2010). The NMB has not stated whether any one factors is more probative than the others.⁷

⁷ It should be noted that carrier control over employee compensation is not required to find RLA jurisdiction. See, e.g., *New York Interstate Serv., Inc.*, 14 NMB 439, 441 (1987) (finding RLA jurisdiction even though employer "independently set[] the rates of pay and benefits its employees receive[d] [and] receive[d] monthly payments from [airline] which fluctuate[d] with the number of hours worked that month by [contractor] employees."); *John Menzies PLC d/b/a Ogden Ground Servs., Inc.*, 30 NMB 404, 408 (2003) (finding RLA jurisdiction even though employer determined the rates of pay and benefits for its employees).

It is clear, however, that not all of the factors must be present to meet the control test. In fact, in the large majority of NMB decisions, at least some factors have not been present.⁸ As further analyzed in a ruling from the Southern District of New York, the court stated:

While evidence of the degree of control and supervision of the carrier over the individual employee is relevant, it is not the end of the inquiry. Rather, in determining whether an entity is controlled by an air carrier, the NMB considers factors including "the extent of the carrier control over the manner in which the company conducts its business; access to [the] company's operations and records; [the carrier's] role in personnel decisions; [the carrier's] degree of supervision over the company's employees; [the carrier's] control over employee training; [] whether company employees are held out to the public as employees of the carrier," *John Menzies*, 31 NMB. at 504-05, "the carrier's role in the entity's daily operations," "the entity's employees' performance of services for the carriers," and "the degree to which the carriers affect other conditions of employment," *Int'l Total Servs.*, 26 NMB. 72, 75. See also *Andy Frain Servs., Inc.*, 19 NMB at 164 (listing similar factors).

Cunningham, 579 F. Supp. 2d at 542 (citations and elided or substituted portions in original). Moreover, it is the carriers' right to exercise the indicia of control that is critical to the inquiry, even if that right has been exercised only occasionally — or not at all. See, e.g., *Int'l Cargo Marketing Consultants, d/b/a Alliance Air*, 31 NMB 396, 407 (2004) (carrier's plan to require entity's employees to wear carrier's uniform, and entity's willingness to do so, cited as indicia of carrier control); *Command Security Corp.*, 27 NMB 581, 585 (2000) (analyzing carrier control based solely on provisions in contracts with carriers); *Huntleigh USA Corp.*, 29 NMB 121 (2001) (citing carrier's authority under several provisions in the contract in finding company subject to RLA).

⁸ See, e.g. *Kannon Serv. Enters. Corp.*, 31 NMB 409, 417 (2004) (finding RLA jurisdiction even though employer determined which employees worked each shift; employees did not wear carrier uniforms; carriers did not directly supervise its employees; and carriers never requested the employer to discipline or remove employees); *Int'l Total Servs.*, 26 NMB 72, 76 (1998) (finding RLA jurisdiction even though employer hired and fired its own employees).

a. Control over the manner in which the entity conducts its business, including access to the employer's operations and records.

PrimeFlight employees perform their passenger services for JetBlue entirely within the terminal where JetBlue operates. Indeed, PrimeFlight has no physical space of its own and relies on JetBlue for all offices, storage, locker rooms, and break rooms. For its JFK operations, PrimeFlight operates at the direction of JetBlue, receiving flight schedules and wheelchair data from JetBlue which determine PrimeFlight's staffing levels, employee scheduling, and wheelchair availability. PrimeFlight provides to JetBlue reports on staffing levels and the number of wheelchair interactions between PrimeFlight employees and passengers. JetBlue management coordinates with PrimeFlight's supervisors on a daily basis to ensure that PrimeFlight provides the necessary wheelchair, line monitoring, and baggage services. JetBlue has broad rights to access and audit PrimeFlight's records. In any subject which is directly related to the services provided to JetBlue by PrimeFlight, PrimeFlight is required to provide JetBlue with copies of records. Among the types of records JetBlue may access are core employment-related materials such as workplace accident and injury reports and employee disciplinary actions. JetBlue also has the right to audit and inspect the provision of services provided by PrimeFlight at JFK.

b. Involvement in hiring, firing and disciplinary decisions.

As established in Barry's testimony and the express terms of the GTA discussed in detail above, in the event JetBlue demands the removal of an employee from the workplace, which JetBlue has the right to do, PrimeFlight must terminate that employee.

c. Influence over the conditions of employment.

JetBlue exercises broad, constant influence over all workplace conditions for PrimeFlight employees. Employee shifts, schedules, and hours are set at the business demand of JetBlue, as

are staffing levels determining employee workloads. The locker rooms and break rooms used by PrimeFlight employees are provided by JetBlue on property controlled by JetBlue.

In executing their job duties, which are designed specifically and only for JetBlue's passenger needs, PrimeFlight employees use equipment provided, controlled, and stored by JetBlue. JetBlue provides the wheelchairs used to transport passengers, the radios and telephones with which employees communicate, the baggage carts they use to transport baggage, and the computers and technology platform they use to accomplish and record their tasks.

d. Influence over the conditions of employment.

JetBlue requires that PrimeFlight provide its employees with all necessary initial and recurrent training to perform JetBlue passenger services. Beyond their work duties and PrimeFlight internal rules, PrimeFlight employees must learn JetBlue's policies and complete the training JetBlue gives its own employees.

e. Control over uniform and appearance requirements.

Prior to commencing work on the contract at JFK, PrimeFlight first had to receive approval from JetBlue's branding department regarding the uniforms PrimeFlight employees were to wear. JetBlue maintains ongoing control over PrimeFlight employee uniforms.

Given the strong evidence of carrier control, as established above, PrimeFlight submits that it is subject to the RLA, not the NLRA. As such, all of the allegations in the complaint must be dismissed as the NLRB does not have jurisdiction over PrimeFlight. Assuming for the sake of argument PrimeFlight is found to be subject to the NLRA, the General Counsel has still failed to carry its burden of establishing that PrimeFlight is a *Burns* successor.

C. **Analysis of PrimeFlight's Full Complement of Employees Demonstrates That Predecessor Employees Comprise Less Than 40% of the Appropriate Unit**

Generally speaking, in order for a new employer to be a successor to the bargaining obligations of a predecessor employer, there must be a finding of a presumptive continued majority status on the part of the labor organization involved. See *NLRB v. Burns Int'l Sec. Servs.*, 406 U.S. 272, 280-81 (1972) (stating standard that union representation of "a majority of the employees hired by the new employer" establishes presumptive bargaining obligation with incumbent union). To establish successorship status, a majority of employees in the successor employer's bargaining unit must have been employed by the predecessor. The timing of that calculation is appropriate when a substantial and representative complement exists. See *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 27 (1987). The Board should consider the following factors in making that determination:

- whether the job classifications designated for the operation were filled or substantially filled;
- whether the operation was in normal or substantially normal production;
- the size of the complement on that date and the time expected to elapse before a substantially larger complement would be at work; and,
- the relative certainty of the employer's expected expansion.

See *Fall River Dyeing Corp*, *supra* at 48-49. The Board has held that it is appropriate to delay the bargaining obligation determination where the new employer expects with reasonable certainty to substantially increase its employee complement within a relatively short period of time. *Myers Custom Products*, 278 NLRB 636 (1986).

As alleged in the Amended Complaint, on May 23, 2016 SEIU 32BJ demanded recognition by PrimeFlight as the labor representative for the former "Air Serv employees

represented by Local 32BJ." SEIU 32BJ's demand included a demand for recognition of PrimeFlight's Wheelchair Services employees:

As we understand it, the appropriate bargaining unit also includes employees providing wheelchair assistance. We request recognition for a unit of all full-time and regular part-time employees at Terminal 5 on the Jet Blue account, excluding supervisors, office clericals, and guards as defined in the NLRA.

See, Jt. Ex. 3. In other words, SEIU 32BJ demanded that PrimeFlight recognize SEIU 32BJ as the union representing a wall-to-wall unit of PrimeFlight's employees. NLRB Region 29's Amended Complaint recognizes the same wall-to-wall unit as alleged to be appropriate for recognition. Paragraph 8 of the Amended Complaint states, "The following employees of Respondent [PrimeFlight] ("the Unit") constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the [NLRA]:

All full-time and regular part-time employees employed by Respondent at JFK Airport, excluding confidential employees, office clericals, guards and supervisors, as defined by the Act.

As a threshold factual consideration, therefore, the Wheelchair Services employees, a classification not represented by SEIU 32BJ at Air Serv, are irrefutably a critical part of the proposed bargaining unit. Key to evaluating PrimeFlight's proper complement of employees, then, is the fact that PrimeFlight did not reach that complement until it had added the new classification of Wheelchair Services to the prior operation and hired hundreds of previously unrepresented employees into that classification

As stated, upon taking over the JetBlue contract and beginning operations, PrimeFlight determined that it needed 500 employees to be hired in two additional phases beyond the initial hiring done by PrimeFlight prior to beginning operations. The first phase of hiring had occurred

in April 2016, prior to PrimeFlight's beginning operations. The second phase occurred in early June 2016, and the third phase occurred in mid- and late June 2016.

With respect to the first phase of hiring prior to the May 9 start-up date, hired approximately 362 employees (Er. Ex. 4). And, during that initial hiring phase, PrimeFlight hired approximately 189 former AirServ employees. Jt. Ex. 1. While a few former AirServ employees were hired into Wheelchair Services, this was a change in position for the former Air Serv employees because Pax Assist, not Air Serv, provided those services previously. (Tr. at 218).

Heavy hiring continued in early June to accommodate the massive demand for Wheelchair Services. In a matter of four weeks following PrimeFlight's initiation of operations at JFK, by June 16, 2016, the size of the employee complement increased substantially from 362 to 440 while the number of predecessor employees from Air Serv increased by only eight employees, to 197 total and the percentage of predecessor employees from Air Serv was not a majority of the workforce as of June 16, 2016. (Er. Ex. 5 and Jt. Ex. 1). In fact, expansion was a foregone conclusion, and with at least 440 employees on June 16, 2016, the percentage of predecessor employees in the unit requested by SEIU 32BJ was 44% (197 divided by 440). Consequently, PrimeFlight is not a successor to Air Serv and no bargaining obligation exists.

D. PrimeFlight's Mandatory Arbitration Agreement Does not Violate the NLRA because DR Horton I was Wrongly Decided

To the extent the NLRB has recently found a previously unrecognized non-waivable "right" to pursue class action claims in cases such as *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012) ("*D.R. Horton I*"), enf. denied in relevant part, 737 F.3d 344 (5th Cir. 2013) ("*D.R. Horton II*") and *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014) ("*Murphy Oil I*"), enf. denied in relevant part, 808 F.3d 1013 (5th Cir. 2015) ("*Murphy Oil II*"), the NLRB has ruled in error and contrary to federal law.

Two Circuit Courts - the Seventh and the Ninth - have ruled in cases arising under the Fair Labor Standards Act (not the NLRA) that class and collective action waivers in arbitration agreements are unlawful⁹, thus creating a split with decisions in the Fifth and Eighth Circuits arising under the NLRA which upheld class and collective action waivers.¹⁰ The NLRB filed amicus briefs in the two FLSA cases in the Seventh and Ninth Circuits. The NLRB and employer groups have petitioned the Supreme Court to review *D.R. Horton* and *Murphy Oil* out of the Fifth Circuit to resolve the split.

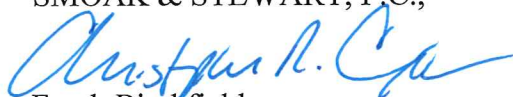
While PrimeFlight operates out of airports all over the country, it has operations in the 5th Circuit, where the law is clear that waivers of class and collective actions in mandatory arbitration agreements are lawful. The Employer has the right to follow that law.

V. CONCLUSION

For all of the reasons discussed above, PrimeFlight submits that Amended Complaint should be dismissed in its entirety.

Respectfully submitted,

OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.,

A handwritten signature in blue ink, appearing to read "Frank Birchfield", is written over the printed name.

Frank Birchfield
Christopher R. Coxson

⁹ *Lewis v. Epic Systems Corp.*, 823 F. 3d 1147 (7th Cir. 2016) and *Morris et al. v. Ernst & Young, LLP*, No. 13-16599 (9th Cir. 2016)

¹⁰ *D.R. Horton II, supra*, *Murphy Oil Supra*, and *Cellular Sales of Missouri, LLC v. NLRB*, 824 F. 3d 772 (8th Cir. 2016).

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

PRIMEFLIGHT AVIATION SERVICES, INC.))	
)	
Respondent,)	
)	NLRB CASE NOS.: 29-CA-177992
and)	29-CA-179767
)	29-CA-184505
SERVICES EMPLOYEES)	
INTERNATIONAL UNION, LOCAL 32BJ)	
)	
Charging Party)	
_____)	

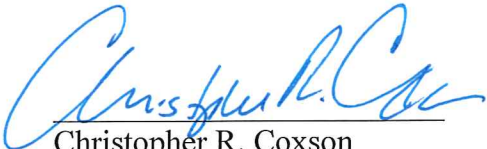
CERTIFICATE OF SERVICE

I hereby certify that in accordance with the NLRB's rules pertaining to electronic filings and NLRB Rule 102.114(i), a true and correct copy of the foregoing Post-Hearing Brief was timely filed via the NLRB E-filing system and was served on the following on the date below by undersigned counsel for PrimeFlight Aviation Services, Inc. via electronic mail:

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Dated this 19th day of December 2016.



Christopher R. Coxson